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Supreme Court, U.S.
FILED

08-373 SEP 19 2008

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No. 08-

In The

Supreme Court of the United States

STEVEN SMITH,
Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Respondent.

On Petition for *Writ of Certiorari* to the
Pennsylvania Supreme Court

Petition for Writ of Certiorari

Mary Ellen Chajkowski, Esquire
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QUESTIONS PRESENTED

I.

Whether it was an error to dismiss Petitioner's workers' compensation claims as untimely?

II.

Whether failure to grant Petitioner a hearing constituted a 14th Amendment Violation?

III.

Whether adjudication without a hearing to admit evidence and properly adduce facts is in accord with Petitioner's statutory rights under the controlling state and federal law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to R. 14.1, the following list identifies all parties appearing here and in the court below.

Petitioner here and in state courts is Steven Smith, a commercially licensed driver poisoned in the course of employment by hazardous material, shipped inbound from Michigan in a damaged container and outbound from Pennsylvania by Respondent

The self-insured common/carrier Respondent here and in Pennsylvania courts is Petitioner's employer for thirty-years, Consolidated Freightways, Inc., a Delaware corporation headquartered in California.

Con-way, Inc. asserted, in its 2006 civil action against Petitioner, that its corporate successor interest to Consolidated is on record with the PA Department of Labor.

Pursuant to Rule 29.6, Petitioner states that Petitioner is not a corporation.

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U.S. Const. Amend. XIV, sec. 1, "..nor shall any State deprive any person of life, liberty, or property, without due process of law."

Federal Hazardous Communication Statute: 29 CFR 1910.1200, *et seq.*

Pa. Right to Know Act 1984-159.

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Mr. Steven Smith respectfully petitions for a *writ of certiorari* to review the judgment of the Pennsylvania Supreme Court in this case.

OPINION BELOW

The Pennsylvania Supreme Court order *per curiam* at 78 WM 2007 is attached to this petition as Appendix A.

The Workers Compensation Appeal Board Order - A07-0371 is attached as Appendix B.

JURISDICTION

The Pennsylvania Supreme Court entered its decision and order on June 25, 2008.

A Petition for Reconsideration filed July 8, 2008 was withdrawn September 19, 2008, upon filing this Petition for *Writ of Certiorari.*

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Smith asserted below and asserts in this petition the deprivation of rights secured by the Constitution.

CONSTUTIONAL PROVISIONS

This case involves the U.S. Const. Amend. XIV, section 1 "....nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make. U.S.C.A. Const. Art. III s2, cl.2

STATEMENT OF THE CASE

Respondent reported Petitioner's February 28,1996 hazardous "exposure" to departments of Labor and Transportation.

Petitioner's workers' compensation report stated he suffered nausea, lightheadedness and a bitter taste in his mouth from inhaling a leaking shipment of poison on the truck.

Respondent reported to DOL Petitioner's symptoms from breathing 6.1 PG III fumes.

Respondent reported to DOT that the shipment was damaged in transit, contrary to its manifest; it was damaged inbound.

Respondent's terminal manager reported Petitioner was "exposed" to damaged and leaking boxes loaded by untrained workers.

OSHA investigated, cited and fined Respondent employer but an April 12, 1996 a settlement was entered to abate fines.

The same date self-insured Respondent employer settled with OSHA, it sent Petitioner to its medical panel providers who refused to release Petitioner to return to work.

Respondent refused to pay medical bills it generated sending him to its panel provider.

May 6, 1996, self-insured Respondent filed untimely Notice of Denial in *bad faith*, aware administrative courts have limited jurisdiction and no training on hazardous transport.

Respondent contested Petitioner's claims by denying facts set forth in Chemrex MSDS.

Petitioner first learned that Respondent entered a settlement with OSHA at the administrative hearing, where Respondent

contested "causation" and stated to the court that its shipment was NOT poison and NOT damaged [Hrg. Transcript, pp. 60-61], assertions contrary to its OSHA settlement, its shipping documents, its reports to DOT and DOL, and Chemrex MSDS in its possession.

Self-insured Respondent submitted a false expert chemical report, which stated there was no available literature on the chemical.

It was a material omission for self-insured Respondent to withhold Chemrex MSDS from its expert, from Petitioner and his medical providers, and from the Pennsylvania courts.

Self-insured Respondent constructively discharged its thirty-year employee when it refused to return Petitioner to work, age 59.

The WCAB consolidated Petitioner's first appeals and entered a dismissal order on December 31, 1999, not 1997 as stated in the last paragraph of Appendix B, a 2007 WCAB order under consideration before this court.

Petitioner requested his "exposure" records, which OSHA released to him in 2001. Petitioner exercised due diligence and made a timely request within twenty-one months of the 1999 WCAB decision for a hearing to admit Chemrex MSDS evidence wrongfully withheld from him in 1996, which the Pennsylvania courts inequitably denied.

Petitioner filed a penalty petition for a hearing to prove allegations Respondent perpetrated a fraud on the court through perjury, as Chemrex MSDS contradicts every document Respondent submitted *ab initio*. Shipping docs are *prima facie* evidence.

REASON WRIT SHOULD BE GRANTED

The Hazardous Communication Statute, 29 CFR 1910.12, *et seq.*, is a neutral federal law to protect the public. Every individual who 'ruled on' or 'contested' the Petitioner's claims and appeals in the state court system is entitled to statutory chemical disclosure, 29 CFR 1910.1200(i)(3)(ii)(A) and payment for medical treatment Id at 1910.1200(i)(3)(ii)(D). It was a violation of the 14th Amendment for Pennsylvania courts to deny request for a hearing on Respondent obstructive conduct That inequitable state action occasioned an unconstitutional taking of Petitioner property.

I. PREJUDICIAL ERROR OF LAW

The Workers' Compensation Act is remedial legislation and, thus, is subject to liberal construction to effectuate the Act's purpose of benefiting injured workers and their dependents. 77 P.S. §1, *et seq.*

Petitioner filed successive claims and appeals to admit evidence that Respondent perpetrated a fraud and the Pennsylvania courts denied Petitioner any hearing.

Respondent paid Petitioner no benefits *ab initio* and asserted affirmative defenses in response to allegations of fraud and perjury.

Petitioner is entitled to due process and an order supported by substantial evidence.

The Pennsylvania Supreme Court doctrine of equitable *estoppel* must be applied here:

> "Equitable *estoppel* arises in the workers' compensation arena when an employer, by its acts, representations, or admissions, or by its silence when it ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. Westinghouse Elec. Corp./CBS v. WCAB (Korach), 833 A.2d 579 (Pa. 2005).

The Chemrex MSDS contradicts every document submitted by Respondent in a *bad faith* contest of Petitioner's claim.

Failure to hold a hearing to admit new evidence on allegations of Respondent's fraud occasioned prejudicial legal error.

Under the statute of repose, Petitioner had 500-weeks to establish employer liability. Therefore, Petitioner filed timely petitions for a hearing to admit evidence his self-insured employer perpetrated a fraud on the court.

> "Section 413(a) contains a three-year statute of limitations for filing petitions to review, modify, reinstate compensation. *See* Smith v. WCAB, 543 Pa. 295, 670 A.2d 1146 (1006). Section 413(a) also imposes a statute of repose whereby a petition for reinstatement of suspended benefits must be filed within 500 weeks of suspension of compensation. Lopresti v. WCAB (Taylor Wharton Co.), 692 A.2d 629 (Pa. Cmwlth),

appeal denied, 549 Pa. 720, 701 A.2d 580 (1997). This Court has held that the 500-week period is calculated from effective date of the suspension rather than the date of order suspending compensation. Roussos v. WCAB (St. Vincent Health Center), 157 Pa. Cmwlth. 584, 630 A.2d 555 (1993)."

The difference in calculating the two time periods becomes understandable when one considers the fundamental difference between the two types of limitation periods. A statute of limitations extinguishes the availability of a remedy, whereas statute of repose extinguishes the underlying right. Smith; Black's Law Dictionary 927 (6th ed. 1990). Thus the calculation of the 500-week statute of repose hinges closely upon the status of the claimant's right to compensation, while the calculation of the three-year statute of limitations hinges upon the claimant's need for a remedy." Flanigan v. WCAB (Colt Industries), 726 A.2d 424 (Pa. Cmwlth. 1999).

Petitioner was never given a chance to admit Chemrex MSDS in order to establish Respondent liability and to prove a causal relationship between his mucous membrane damage or irregular heart-beat and his hazardous "exposure". In Flanigan, the PA Commonwealth Court vacated a WCAB Order where claimant was denied any

opportunity to present evidence in the reinstatement proceedings. The appellate court stated that claimant was entitled to prove that her condition has changed and that she has suffered a recurrence of her work-related disability. Id.

Petitioner was entitled to Chemrex MSDS for medical treatment and causation proof. Respondent breached its statutory duty under federal Hazardous Communication Statutes, 29 CFR 1910.1200, *et seq.* and the Pennsylvania Right to Know Act, neutral laws intended to protect the public.

II. INEQUITABLE APPLICATION OF LAW

Petitioner was inequitably denied a hearing to admit evidence while a similarly situated claimant was granted a hearing to admit evidence. In Flanagan, when the record reflected that neither the WCJ nor the Board received any evidence in the reinstatement proceedings, an appeal followed; the orders were vacated by the appellate court and remanded. Flannigan v. W.C.A.B. (Colt Industries), 726 A.2d 424 (Pa.Cmwlth.,1999).

The 1978 claimant in Romanowski was permitted to admit evidence to support a petition filed in 2004 on the 1978 personal injury claim. Claimant returned to work in January 1993 with an agreement. The 500-week period following the suspension of Claimant's benefits ended in July 2002.

> "In October 2004, Claimant filed a reinstatement petition alleging a worsened condition, decreased earning power and a specific loss of his right foot. Employer filed a timely answer denying Claimant's allegations. At an October 2005 hearing, Claimant withdrew his reinstatement claims and proceeded solely with his specific loss claim. A Workers' Compensation Judge (WCJ) held a series of hearings on the specific loss claim, and both parties submitted medical evidence." Romanowski v. W.C.A.B.(Prec. Coil Proc.) 944 A.2d 127(Pa.Cmwlth., 2008).

Petitioner was not afforded due process that courts afforded Romanowski claimant. No substantial evidence supports dismissal.

The lower courts adopted the wrong presumptions regarding burden of proof. Petitioner offered evidence that he was in good health prior to the accident, as the self-insured Respondent knew from its mandatory CDL physical examinations.

> "To meet the burden in the present case, it was proved that Smith had been in good health prior to the accident, and that injury resulted therefrom, making necessary immediate medical attention, which was continued regularly until the time of his death. No other intervening

cause appeared, a matter which is to be considered. Blasband v. P.R.T. Co., 42 Pa. Super. Ct. 325. The doctor who was in charge of the patient... testified positively that, from his observation of the case, he believed the cancer, as a result of which death ensued, arose from the injury." Smith v. Primrose Tapestry Co. 285 Pa. 145, 131 A. 703 (Pa. 1926).

Respondent must be *estopped* from continuing violation of the Pennsylvania Right to Know, as Sec. 16 expressly states: "Any person who knowingly makes a false statement or representation in any list, record or other document required to be maintained pursuant to this actor who intentionally or deliberately refrains from complying with this act shall be assessed a civil penalty of not more than $10,000, or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both." Pa. Rt. To Know Act 1984-159.

Sec 19 – Construction of the Act; (a) No release from liability states: "Nothing in this act shall in any way relieve an employer or supplier from liability with regard to the health and safety of an employee or other persons exposed to any substances, nor shall it relieve an employer or supplier from any other duty or responsibility under any other provision of law." Act 1984-159, Id.

Petitioner's statutory right to hazardous chemical information and treatment is federally regulated to displace conflicts in state law. R.F. v. Abbott Labs, 162 N.J. at 619. Therefore, the Pennsylvania courts must not permit Respondent's obstructive conduct to interfere with the statutory rights of Petitioner.

III. ORDER NOT IN ACCORD WITH LAW

The state courts interfered with Petitioner's statutory and constitutional due process and his right to an order supported by evidence. Without a hearing to admit MSDS evidence, all decisions adverse to Petitioner rest on Respondent's report on the wrong chemical, by an expert who never spoke to and never examined Petitioner. Respondent's expert stated there is no available literature on the chemical, roundly contradicted by MSDS.

> The Pennsylvania Supreme Court's decision in Leon E. Wintermyer, Inc., v. WCAB (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), held that "Since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced, review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Id.

Budd Baer, Inc. v. W.C.A.B. (Butcher)
892 A.2d 64 (Pa.Cmwlth. 2006).

The lower courts never addressed Petitioner claims that Respondent failed to enforce the settlement agreement with OSHA, by coming into compliance with the federal Hazardous Communication statute, 29 CFR 1910.1200, *et seq.* and Pennsylvania Right to Know Law, which entitled Petitioner to exact chemical information, Chemrex MSDS and payment for medical treatment.

Respondent failure to acknowledge its liability occasioned economic losses to Petitioner, his family, his health and welfare fund and the Veterans Administration, in order to pay for his medical treatment.

Petitioner was forced to take retirement one year early, at a monthly loss of one thousand dollars pension income.

Petitioner lost a five-year pension from the state of Illinois due to inequitable treatment.

Petitioner lost a $5,000.00 (five thousand dollar) insurance policy due to the courts' failure to grant him a hearing on the merits.

Many workers today have no health and welfare fund to supplant the loss of medical and wage benefits. Therefore, this case presents an opportunity for this honorable court to address issues of important public policy, as inequitable state action may effect unconstitutional *taking* of property from one party or enrich one party unjustly. The integrity of the courts is at issue here.

The purpose of time limits remain constant:

> 'The time limit in which claims might be filed was placed in the act not only to produce a uniform practice, but to enable employers to know the period of time they could be called upon to respond for just claims, so that they might not be constantly expecting stale claims of doubtful merit.' Smith v. Primrose Tapestry, 285 Pa. 145, 131 A. 703, Pa. 1926

Respondent was fully aware of Petitioner claims and breached a statutory duty when it withheld MSDS from Petitioner, his medical providers and the courts. Petitioner would have prevailed on the merits in 1996 if he had Chemrex MSDS to admit as evidence.

Respondent's obstructive conduct interfered with uniformity and due process, which must not be time-barred by courts.

CONCLUSION

This petition for *Writ of Certiorari* should be granted in the interest of uniformity, statutory compliance and public policy.

Respectfully submitted,

/s/ Mary Ellen Chajkowski, Esquire
Counsel of record for Petitioner
September 19, 2008

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

STEVEN SMITH,
Petitioner,

v.

No. 78 WM 2007

Application for
Extraordinary Relief

WORKERS COMPENSATION
APPEAL BOARD
(Consolidated Freightways, Inc.)

ORDER

PER CURIAM

AND NOW, this 25th day of June 2008, the Application for Extraordinary Relief and the Application for Permission to Reply are hereby DENIED.

A True Copy Patricia Nicola
As of. June 25, 2008
Attest: /s/Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B

OPINION A07-0371

Frioni, Commissioner:

Before the Workers' Compensation Appeal Board is the Appeal of Steven Smith (Claimant) from the Decision and Order of Workers' Compensation Judge (WCJ) Persifor Oliver granting the motion of Consolidated Freightways (Defendant) to dismiss Claimant's Petition for Workers' Compensation Benefits (Claim Petition). We affirm.

On May 15, 1996, Claimant filed his first Claim Petition alleging that on February 28, 1996, he was exposed to the chemical trichloroethane in the course of his duties as a truck driver, and that he was disabled as a result of that exposure. WCJ Kathleen Vallely, in a Decision and Order circulated October 16, 1997 determined that Claimant failed to meet his burden of proving the causal relationship between this exposure and any disability by unequivocal medical evidence. She accepted the fact of the exposure, but found that no injury or disability resulted. WCJ Vallely's Decision was appealed to this Board and was affirmed.

On September 27, 2001, Claimant filed a second Claim Petition alleging a work-related chemical exposure on February 28,

1996, and resultant disability. He argued that he should not be precluded from filing a second petition because Defendant fraudulently withheld Material Data Safety Sheets for the chemicals to which Claimant had been exposed. WCJ Henry dismissed the second Claim Petition on the basis of *res judicata* and *collateral estoppel*, reasoning that the lack of the MSDS was immaterial to the disposition of the previous claim petition. Claimant unsuccessfully appealed or attempted to appeal WCJ Henry's Decision to this Board, the Commonwealth Court, the Pennsylvania Supreme Court, and ultimately the United States Supreme Court.

On September 30, 2004, Claimant filed his third claim petition alleging the same injury on the same date. WCJ Parker dismissed the third claim petition concluding that she lacked jurisdiction over the third petition because Claimant's second petition was on appeal to the Pennsylvania Supreme Court.

On October 25, 2005, Claimant filed a Petition for Penalties (Penalty Petition) alleging that Defendant violated the Worker Compensation Act[1] by failing to pay his medical expenses and indemnity benefits, again referable to an alleged injury of February 28, 1996. WCJ Oliver dismissed the Penalty Petition because claimant failed to identify a violation on the record. Claimant appealed that dismissal to this Board, and

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[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2626.

we affirmed WCJ Oliver's Decision. Claimant's appeal from that Order was dismissed by the Commonwealth Court on May 17, 2007. A Petition for Allowance of Appeal is pending before the Pennsylvania Supreme Court.

On July 19, 2006, Claimant filed a fourth Claim Petition alleging chemical exposure on Feburary 28, 1996 and seeking full disability benefits. Defendant filed an Answer to the Petition and a Motion to Dismiss. WCJ Torrey dismissed the fourth Claim Petition as untimely filed, and on the basis of *res judicata*. By Opinion issued May 21, 2007, we affirmed WCJ Torrey's dismissal on the basis of the statute of limitations and did not reach the second basis for denial.

On November 20, 2006, Claimant filed the present Petition, again alleging disability as a result of chemical exposure on February 28, 1996, in the course of his employment by Defendant. Defendant filed an Answer to the Petition, along with a Motion to Dismiss. Claimant additionally filed a motion for judgment on the pleadings, requesting an award of benefits to Claimant or, in the alternative, that Defendant's Motion to Dismiss be denied and a hearing on the merits scheduled. WCJ Oliver dismissed the Petition on the basis of *res judicata*, *collateral estoppel*, and the statute of limitations. Claimant appeals.

The Board's scope of review on appeal is limited to determining whether the necessary findings of fact are supported by

substantial, competent evidence or whether an error of law was committed. Bethenergy Mines v. WCAB (Skirpan), 612 A.2d 434, (Pa. 1992). If the record contains evidence which a reasonable person might find sufficient to support the WCJ's findings of fact, the findings must be affiremed. Id.

Claimant argues that the WCJ erred as a matter of law by dismissing the Claim Petition as time-barred, maintaining that obstructive conduct by Defendant tolls the statute of limitations. We disagree.

Section 315 of the Act provides in pertinent part:

In cases of personal injury all claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in article four hereof. 77 P.S. §602. The running of the three-year limitation period begins on the date of the injury. McDevitt v. WCAB (Ron Davidson Chevrolet) 525 A.2d 1252 (Pa. Cmwlth. 1987), appeal denied, 552 A.2d 1048 (Pa. 1989).

We determine no error in WCJ Oliver's dismissal of Claimant's Petition as time-barred. The petition alleges a single date of exposure of February 28, 1996, more than three years before the date of filing of this most recent Claim Petition. Moreover, even if the statute of limitations was tolled until Claimant procured an MSDS in 2001, the

filing of this Petition on November 20, 2006 is outside the three-year statute of limitations and is untimely.

Claimant further argues that because his original Claim Petition in 1996 was filed timely, his subsequent claims cannot be time-barred. We disagree.

Petitioner's 1996 Claim Petition was denied because WCJ Vallely determined that Claimant did not meet his burden of proving a causal connection between the work injury complained of and any subsequent loss of earnings. WCJ Vallely accepted as credible medical evidence that any impairment suffered by Claimant was a non-work related condition. This Board affirmed that determination in 1997. No appeal was taken from the Board's decision. Therefore, the litigation of the claim petition ended. Claimant advances no good authority for his contention that subsequent petitions seeking to re-litigate the same facts and circumstances relate back to the filing date of his first petition. We determine no error.[2]

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[2] Because we determine that the present Claim Petition is time-barred, we do not reach Claimant's contention that the WCJ has no authority to dismiss a claim petition without a hearing. Nonetheless, we agree with the WCJ that a full evidentiary hearing is not required in every case, and determine that the WCJ did not abuse his discretion by dismissing the present claim. Karotka v. WCAB (Millcreek Community Hosp.), 840 A.2d 1040 (Pa. Cmwlth. 2003), appeal denied, 835 A.2d 710 (Pa. 2003). We also do not have to address whether Claimant's petition is

We enter the following:

ORDER

The Decision and Order of the Workers' Compensation Judge is hereby AFFIRMED.

BY THE BOARD:
/s/ Alfonse Frioni
Commissioner

CONCURRED IN BY:

/s/ Seven Additional Commissioners

September 18, 2007

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barred by *res judicata* or *collateral estoppel*, but observe that the WCJ's decision makes a compelling case for dismissal on those grounds as well.